IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

JAVIER QUEREGUAN, Plaintiff, v. NEW CASTLE COUNTY, a political subdivision of the State of Delaware, Defendant and Third-Party Plaintiff, v. STATE OF DELAWARE, Third-Party Defendant.	)	Civil Action No. 20298-NC

MEMORANDUM OPINION

Submitted: January 4, 2006
Decided: April 24, 2006

Javier Quereguan, Wilmington, Delaware, *Pro Se Plaintiff*

Eric L. Episcopo, Esquire, NEW CASTLE COUNTY, New Castle, Delaware, *Attorney for Defendant and Third-Party Plaintiff*

Laura L. Gerard, Esquire, DEPARTMENT OF JUSTICE, Wilmington, Delaware, *Attorney for Third-Party Defendant*

PARSONS, Vice Chancellor.

Pending before the Court is the Third-Party Defendant, the State of Delaware's ("State"), motion to dismiss the Third-Party Complaint asserted by Defendant, New Castle County ("County"). The Third-Party Complaint essentially seeks to hold the State liable for harm to the County attributable to water damage to Plaintiff, Javier Quereguan's, home and property. The State seeks to dismiss the Third-Party Complaint on grounds that it is barred by sovereign immunity, the lease agreement between the County and the State, *res judicata* and laches. In addition the State seeks dismissal of the County's cross-claim for contribution or indemnification from the State.

The County opposed the State's motion and perfunctorily moved for summary judgment in the County's favor. For the reasons stated in this memorandum opinion, I deny both the State's motion to dismiss the Third-Party Complaint and the County's motion for summary judgment.

I. BACKGROUND

A. Facts[1]

The underlying dispute in this case involves Quereguan's allegation that water drains from a retaining wall located along a side of the Absalom Jones Community Center property (the "Center Property") that borders his residential property (the "Quereguan Property") onto the rear of the Quereguan Property, thereby causing damage to his house and yard. Quereguan's amended complaint, filed July 19, 2005 (the

[1] For a more detailed recitation of the facts *see Quereguan v. New Castle County*, 2004 WL 2271606 (Del. Ch. Sept. 28, 2004).

"Complaint"), seeks, among other things, monetary damages and injunctive relief to repair the wall.[2]

The Quereguan Property is located at 320 Maple Avenue in Wilmington, Delaware. Quereguan alleges that sometime after he purchased his Property in or around 1995 water began draining onto it through a retaining wall located at the edge of the Center Property. When Quereguan first noticed the drainage problem, he filed a Complaint in Superior Court against the owner of the Center, the Red Clay Consolidated School District ("Red Clay"), the County, and the State.

At one point, the County leased a portion of the Center Property to a Department of the State of Delaware. The State maintained general tenant liability insurance from July 1, 1980 to October 31, 2002. The insurance, however, did not cover the type of damage alleged in Quereguan's Complaint.

On July 1, 2002, the Governor signed into law the Bond and Capital Improvements Act of the State of Delaware for Fiscal Year Ending June 30, 2003 (the "Bond Bill"). Section 56 of the Bond Bill states:

> Section 56. Belvedere Service Center. It is the intent of the General Assembly that the Department of Administrative Services (Department) shall not take title to the Absalom Jones School unless the three following conditions are met: (1) Lease agreements must be accepted and executed by a sufficient number of tenants so that the aggregate rental income in other than the first year of ownership by the Department is at least equal to the estimated annual operating

[2] I granted Quereguan's motion to amend the complaint in a teleconference held on July 28, 2005. I denied his motion to amend, however, to the extent it attempted to assert new claims against the State for personal injuries.

> costs of the facility, (2) New Castle County must transfer $500,000 to the Department to cover capital repairs planned by the Department and the operating costs for the first year of operation, and (3) the Department of Education must transfer $500,000 programmed for the Absalom Jones School in the Fiscal Year 2002 capital budget to the Department. If the Department takes title to the Absalom Jones School the following condition shall apply: liabilities that may be associated with drainage problems that occurred prior to the date of the transfer that result in the flooding of properties adjacent to the Absalom Jones School shall not be transferred to either the Department or the state.[3]

On October 15, 2002 the State and the County executed a lease agreement (the "Lease") whereby the State assumed "sole cost and expense for performance of [certain specified] building services." Specifically, the State bore responsibility for services related to: (1) utilities, other than telephone; (2) janitorial and custodial services; (3) repair and maintenance of heating, air conditioning, plumbing, electrical and lighting systems; (4) exterior, structural, grounds, parking area repair and maintenance, including snow and ice removal; and (5) ordinary repair and maintenance to the interior and exterior of the building.[4] In paragraph 13, however, the Lease notes that "lessor is self-insured as to property insurance as an agency of the State of Delaware and is sovereignly immune from liability claims."[5]

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[3] State of Delaware's Reply Br. in Supp. of its Mot. to Dismiss New Castle County's Third-Party Compl. and in Opp'n to New Castle County's Mot. for Summ. J. ("DRB") Ex. 3.

[4] Lease ¶ 5. A copy of the Lease appears as Ex. A to Def.'s Third-Party Compl. against Third-Party Def. State of Delaware ("the Third-Party Complaint").

[5] *Id*. at 7.

The Lease term extends from August 1, 2002 to July 31, 2007, and the County has options to renew it for additional periods. On July 7, 2003, Red Clay transferred ownership of the Center Property to the State. The State took title to the Center subject to the restrictions set forth in Section 56 of the Bond Bill.

B. Procedural History

On or about January 10, 2003, Quereguan filed his original complaint against the County, Red Clay and the State in Superior Court. In 2003, the County, Red Clay, and the State filed motions to dismiss on various grounds. The State moved to dismiss on the basis that it had not waived sovereign immunity.

Subsequently, the case was transferred to the Court of Chancery, which held argument on the motions to dismiss on June 16, 2004. In an opinion dated September 28, 2004, I granted the State's motion to dismiss Plaintiff's claims for monetary damages, but denied the motion as to Plaintiff's claim for injunctive relief.

The State moved for reargument on the injunctive relief claim. Neither Quereguan nor the County opposed or otherwise responded to that motion. In a November 24, 2004 opinion, I granted the State's motion and dismissed Quereguan's claim against the State for injunctive relief.[6]

From October 2004 to June 2005, Plaintiff and the County proceeded with the litigation, including discovery. The Court began a trial on June 13, 2005, but the next day granted the parties' request to adjourn and continue the trial to enable the County to

[6] *Quereguan v. New Castle County*, 2004 WL 3038025 (Del. Ch. Nov. 24, 2004).

file a third-party complaint. On July 14, 2005, the County filed its Third-Party Complaint against the State based on the Lease.[7] The Third-Party Complaint asserts that the State breached the Lease, seeks relief on that basis and claims entitlement to contribution and indemnification from the State under the Uniform Contribution Among Tort-Feasors Law, 10 *Del. C.* §§ 6301-6308, or other applicable law.[8] The State now seeks to dismiss the Third-Party Complaint.

II. ANALYSIS

A. Standards[9]

When considering a motion to dismiss under Court of Chancery Rule 12(b)(6), the court must assume the truthfulness of all well pled facts in the complaint and view those facts and all reasonable inferences drawn from them in the light most favorable to the nonmoving party.[10] Conclusory allegations that are unsupported by facts contained in the

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7 Quereguan did not object to the filing of the Third-Party Complaint.

8 Third-Party Compl. ¶¶ 9-10.

9 In their response to the State's motion, the County asserts that I should treat the State's motion to dismiss as a motion for summary judgment and enter summary judgment in the County's favor. Apart from a couple of conclusory statements that it is entitled to summary judgment, however, the County provides no explanation as to why the motion to dismiss should be converted into a motion for summary judgment or why the County is entitled to summary judgment in its favor. Because the County did not identify any basis for converting the State's motion under Rule 12(b)(6) into one for summary judgment, such as reliance on extrinsic evidence, the Court declines to accept that suggestion. Moreover, several of the County's arguments on the merits of the State's motion hinge on further development of the factual record. Thus, I summarily deny the County's own half-hearted motion for summary judgment.

10 *Anglo Am. Sec. Fund, L.P. v. S.R. Global Int'l Fund, L.P.*, 829 A.2d 143, 148-49 (Del. Ch. 2003).

complaint or documents integral to the complaint and incorporated by reference therein will not be accepted as true.[11] Dismissal is appropriate under Rule 12(b)(6) only when it appears with reasonable certainty that the plaintiff would not be entitled to relief under any reasonable set of facts properly supported by the complaint and any integral documents incorporated by reference therein.[12]

B. Did the State Waive Sovereign Immunity?

The parties dispute whether the State waived sovereign immunity through the Bond Bill or by executing the Lease. I will discuss each of those issues in turn.

In general, the doctrine of sovereign immunity provides that the State may not be sued without its consent. Article I, § 9 of the Delaware Constitution provides that the only way to limit or waive the State's sovereign immunity is by an act of the General Assembly. Therefore, unless the General Assembly waived sovereign immunity by statute, a claimant's suits must fail.[13] This waiver, however, need not be express.[14] In particular, when the Legislature authorizes the State to enter into a contract, the State implicitly waives the protection of sovereign immunity for breach of that contract.[15] Therefore, I will first examine whether any statute implicitly or explicitly waived

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11 *Id.*

12 *Id.*

13 *Doe v. Cates*, 499 A.2d 1175, 1176-77 (Del. 1985).

14 *Blair v. Anderson*, 325 A.2d 94, 96 (Del. 1974).

15 *Middleton v. Wilmington Hous. Auth.*, 1994 WL 35382, at *1-2 (Del. Feb. 2, 1994).

sovereign immunity with respect to the Lease. Second, I will address whether the Third-Party Complaint adequately alleges a claim for breach of the Lease.

1. Does any statute waive sovereign immunity for breach of the Lease?

Several cases have addressed the manner in which the State can implicitly waive sovereign immunity by granting authority to enter into a contract. In *Castetter v. Delaware Department of Labor*, the court held that the state implicitly waived sovereign immunity with respect to breach of a contract.[16] In that case the General Assembly gave the Secretary of the Department of Labor the power

> [t]o make and enter into any and all contracts, agreements or stipulations, and to retain, employ and contract for the services of private and public consultants, research and technical personnel, and to procure by contract, consulting, research, technical and other services and facilities, whenever the same shall be deemed by the Secretary necessary or desirable in the performance of the functions of the Department.[17]

The court explained that by authorizing the Secretary to enter into a contract, the State implicitly waived its sovereign immunity with respect to a breach of contract claim. Therefore, the court held that if the evidence showed that the State failed to meet its contractual obligation, it would be held liable for breach of contract.[18] The court, however, refused to extend the waiver of sovereign immunity to tort liability, unless the

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16 2002 WL 819244, at *4 (Del. Super. Apr. 30, 2002).

17 *Id.*

18 *Id.*

state insured against a particular risk and the action in question was done in bad faith or with gross negligence.[19]

Here, the General Assembly has given the Department of Administrative Services (the "Department") authority to enter into lease agreements. Specifically, 29 *Del. C.* § 8803 provides:

> The Secretary [of the Department of Administrative Services] shall have the following powers, duties and functions:
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> * * * *
>
> (14) To negate, review and approve, on behalf of all state departments and agencies, all leases and lease renewals for facilities throughout the state; . . .[20]

Thus, as in *Castetter*, by granting the Secretary of the Department authority to enter into contracts the State implicitly waived sovereign immunity as to agreements the Secretary entered into on behalf of the State. In this case Gloria Homer, Secretary of the Department approved the Lease. Therefore, absent legislative action to the contrary, the State implicitly waived sovereign immunity for breach of the Lease.

2. The relationship between the Bond Bill and the Lease

The State argues that it is not liable for damage to Quereguan's Property because the Bond Bill expressly states that the State will not assume liability for pre-existing drainage problems. Thus, it contends that the Lease is void *ab initio* because even if the

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[19] *Id*.; *see also Marvel v. Prison Indus.*, 884 A.2d 1065, 1069 (Del. Super. 2005) (although sovereign immunity had been waived as to contract actions it remained a viable defense against tort claims).

[20] Repealed by 75 Del. Laws, c. 88, § 14, eff. July 1, 2005. The repeal of this statute in 2005 has no effect on the issues currently before me.

General Assembly did waive sovereign immunity that waiver would not extend to the type of damage for which Quereguan seeks relief. The County responds that by granting authority to enter into the Lease, the State waived sovereign immunity for breach of that agreement. Further, the County asserts that even if the Bond Bill does not assume liability for pre-existing water damage, it did allow the State to assume liability for water drainage problems arising after it entered into the Lease.

The Bond Bill does not affect the State's waiver under 29 *Del. C.* § 8803. The Bond Bill states that:

> If the Department [of Administrative Services] takes title to the Absalom Jones School the following condition shall apply: liabilities that may be associated with drainage problems that occurred *prior* to the date of the transfer that result in the flooding of properties adjacent to the Absalom Jones School shall not be transferred to either the Department or the state.[21]

By the Bond Bill's explicit terms it did not transfer liability for pre-existing drainage problems to the State. The Bond Bill does not bar the State, however, from entering into agreements whereby it could become liable for drainage problems that occurred *after* the date of the transfer, which would be August 1, 2002, at the earliest.[22] Thus, if the County

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[21] Emphasis added.

[22] For purposes of interpreting the Bond Bill for the State's motion to dismiss, the allegations in the Complaint suggest that the "date of the transfer" was August 1, 2002, at the beginning of the Lease's term, although title to the property did not transfer to the State until July 7, 2003. *See* Third-Party Compl. ¶ 2 ("Since August 1, 2002, the State of Delaware has had complete ownership interest in the [Absalom Jones School].") I use this date because the Bond Bill references two distinct events. First, with respect to liability for drainage problems it refers to the "date of the transfer." And second, it conditions the State's acceptance of "title"

can prove that after the date of transfer the State maintained the property in a manner that resulted in drainage problems on the Quereguan Property and a breach of the Lease, the County conceivably could overcome the State's sovereign immunity defense to such a claim.

3. The Lease

The State contends that the Lease does not waive sovereign immunity because paragraph 13 explicitly asserts that right. Furthermore, the State contends that the Lease cannot cover the damage to the Quereguan Property because the Bond Bill never granted the State authority to undertake such an obligation.

The County responds that the State breached the Lease by failing to maintain the retaining wall after the transfer date, thereby causing a drainage problem on the Quereguan Property. Further, the County contends that the State's obligations under the Lease do not contradict the restrictions in the Bond Bill.

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on, among other requirements, the State executing lease agreements, such as the Lease in this case, to a sufficient number of tenants. This interpretation of the Bond Bill appears to comport with the intent of the General Assembly in that the parties entered into the Lease in anticipation that the State eventually would purchase the property. In fact the Lease refers to the State as "Lessor" even though it did not take title to the property until almost a year later. Thus, it appears the General Assembly intended to treat the "date of the transfer" as different from the date when title formally transferred to the State. Further, even if the date of the "transfer" was July 7, 2003, that would not affect my opinion that the State has failed to show that the Third-Party Complaint should be dismissed on grounds of sovereign immunity.

To survive a motion to dismiss for failure to state a breach of contract claim a plaintiff must demonstrate: (1) a contractual obligation, (2) a breach of that obligation by the defendant, and (3) resulting damage to the plaintiff.[23]

The Third-Party Complaint alleges that the State is liable for all alleged damage to the Quereguan Property occurring after August 1, 2002.[24] Specifically, it avers that the State has full legal responsibility to maintain the retaining wall under the Lease and that if the County is liable to Quereguan for water damage that resulted from the State's failure to maintain the wall after August 1, 2002, the County is entitled to indemnification or contribution from the State.[25]

To determine whether the State breached the Lease, the Court must interpret the language of that agreement. Interpretation of a contract is a matter of law.[26] Contract language that is clear and unambiguous should be given its ordinary and usual meaning.[27] If an ambiguity exists, the court must construe the contract language against the drafter.[28] A contract is ambiguous, however, only when the provisions in controversy are reasonably or fairly susceptible to different interpretations or may have two or more

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23 *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 612 (Del. 2003).

24 Third-Party Compl. ¶ 7.

25 *Id.* ¶¶ 6, 7.

26 *See Hudson v. State Farm Mut. Ins. Co.*, 569 A.2d 1168, 1170 (Del. 1990).

27 *See Rhone-Poulenc Basic Chem. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1195 (Del. 1992).

28 *Id.* at 1196.

different meanings. The standard of interpretation is that of a reasonable person in the position of the parties.[29]

The State contends that paragraph 13 of the Lease supports the proposition that the Lease did not waive sovereign immunity. Paragraph 13 states that "it is hereby understood that Lessor is self-insured as to property insurance as an agency of the State of Delaware and is sovereignly immune from liability claims." In paragraph 5, however, the State agreed to assume sole cost and expense for, among other things, the building's "exterior, structural, grounds, parking area repair and maintenance, including ice and snow removal," as well as ordinary repair and maintenance to the interior and exterior of the building.

Paragraph 13 does not stand for the proposition that the State retained the defense of sovereign immunity as to *any and all* claims under the Lease. Rather, the paragraph merely reminds the parties that the State has not waived sovereign immunity as to any claims other than breach of the Lease. Under the State's interpretation of the Lease, their contractual obligations effectively would be illusory because if the State ever failed to maintain the exterior structures it could invoke sovereign immunity to avoid liability for breach of contract. Such an interpretation would reach an unfair result. At the motion to dismiss stage, I consider it at least conceivable that the County could demonstrate facts under which it could overcome the State's sovereign immunity defense.

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[29] *Id.*

One reasonable interpretation of paragraph 13 is that it reminds the parties that the Lease serves as only a limited waiver of sovereign immunity. Hence, the State may have waived sovereign immunity when it assumed liability for sole cost and expense for ordinary repair and maintenance of the exterior of the Center Property, as well as for any other obligations under the Lease.

The Bond Bill does not change this interpretation. The Bond Bill provided that if and when the Center Property was transferred to the State, it would not assume "liabilities that may be associated with drainage problems that occurred before the date of the transfer that result in flooding of properties adjacent to the Absolom Jones School." Holding the State liable for breach of contract for failing to maintain the retaining wall after the date of transfer to the extent that such failure resulted in harm to the County would not violate that restriction. Thus, I conclude that the Third-Party Complaint adequately alleges a breach of contract claim against which the State does not appear to have a valid sovereign immunity defense. Whether and to what extent the State might be liable for a breach of that nature will depend on a number of facts that are likely to be disputed. Those disputes presumably will involve what the State's responsibilities for maintenance were, what breaches, if any, occurred and when, whether any damage experienced by Quereguan was associated with drainage problems that occurred after the date of the transfer and so on. None of these issues lends itself to resolution on a motion to dismiss or for summary judgment.

C. Is the County's Claim Barred by the Doctrine of *Res Judicata*?

The State also asserts that *res judicata* bars the County's Third-Party Complaint because the Court already dismissed the State from this case on the grounds of sovereign immunity. In response, the County argues that the current matter before the Court involves issues of liability under the Lease, which the earlier opinion and the Complaint do not address.

Under the doctrine of *res judicata*, or claim preclusion, a party is foreclosed from bringing a second suit based on the same cause of action after a judgment has been entered in a prior suit involving the same parties.[30] The doctrine of *res judicata* holds that a final judgment on the merits by a court of competent jurisdiction may bar a second suit on the same matter by the same party, or those in privity with that party.[31] The preclusive effect of the judgment extends to all claims which were or could have been litigated in the earlier proceeding.[32] The elements of the defense of *res judicata* are: (1) the claim in the second action must be the same as in the first action; (2) the prior judgment must be a final personal judgment in favor of one of the parties; and (3) the parties to the second action must be parties, or in privity with parties, to the first action.[33]

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30 *Betts v. Townsends, Inc.*, 765 A.2d 531, 534 (Del. 2000).

31 *Epstein v. Chatham Park, Inc.*, 153 A.2d 180, 184 (Del. 1959).

32 *See Trans World Airlines, Inc. v. Hughes*, 317 A.2d 114, 118 (Del. 1974).

33 *See id.* at 119. The predecessor and successor relationship between successive owners of an interest in property is one of the pre-existing legal relationships that may involve "privity." *See* Restatement (Second) of Judgments § 62, cmt. a & § 43 (1982).

Res judicata does not apply to the issues currently before the Court. Here the State seeks to apply *res judicata* to an earlier decision in this very case and in the absence of any intervening appeal. The doctrine of *res judicata*, however, contemplates two different cases. Furthermore, for *res judicata* to apply, the court adjudicating the first decision must issue a final judgment. The earlier opinion that the State relies on in this case, however, has not resulted in a final judgment on the merits. Moreover, the prior opinion did not address whether the State waived sovereign immunity as to claims for breach of the Lease.[34] Instead, it addressed whether the State waived sovereign immunity by virtue of its ownership interest in the Center Property. Thus, *res judicata* does not apply to the claims asserted by the County in its Third-Party Complaint.

D. Is the County's Claim Barred by the Doctrine of Laches?

The State contends that laches bars the Third-Party Complaint because as of July 2005, the County had not notified them of any alleged breaches of the Lease. The County responds that any delay on their behalf did not prejudice the State. Moreover, the County alleges that it provided the State notice that it breached the Lease on September 20, 2005.

The affirmative defense of laches generally requires proof that: (1) the claimants knew or should have known of the invasion of their rights and (2) unreasonably delayed in bringing suit to vindicate them, and (3) the respondents suffered injury or prejudice as

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[34] Similarly, because my earlier opinion did not deal with the issues currently before me, I find the fact that the County did not oppose the State's previous motion to dismiss insufficient to support a dismissal of the Third-Party Complaint.

a result of the delay.[35] Determining whether or not these three elements exist involves a fact-based inquiry.[36] "In applying laches, a plaintiff is chargeable with such knowledge of a claim as he or she might have obtained upon inquiry, provided the facts already known to that plaintiff were such as to put the duty of inquiry upon a person of ordinary intelligence."[37]

The State has not demonstrated that the County's delay in bringing its claims caused them to suffer injury or prejudice. The County provided the State notice that it breached the contract on September 20, 2005. The Lease does not require the County to provide notice of breach within any specific time period. Furthermore, the County did not violate the three-year statute of limitations for breach of contract, because it filed its Third-Party Complaint within three years of the signing of the Lease.[38] Therefore, any delay by the County did not harm the State and laches does not bar the Third-Party Complaint.

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35 *Homestore, Inc. v. Tafeen*, 888 A.2d 204, 210 (Del. 2005).

36 *Id.*

37 *Grand Lodge of Del., I.O.O.F. v. Odd Fellows Cemetery of Milford, Inc.*, 2002 WL 31716359, at *7 (Del. Ch. Nov. 18, 2002).

38 *See* 10 *Del. C.* § 8106 (providing for a three-year statute of limitations for breach of contract claims). Although the parties entered into the Lease on October 15, 2002 the term of the Lease actually began August 1, 2002, more than three years before the County filed the Third-Party Complaint. Because the statute of limitations would begin to run on the date the County had a legal right to sue for breach of contract, however, the statute of limitations did not begin to run until the parties entered into the Lease on October 15, 2002.

E. Is New Castle County Entitled to Contribution or Indemnity?

The State argues that because the Court previously ruled that it is immune from liability to Plaintiff under sovereign immunity, the County is similarly barred from seeking contribution from the State under the Uniform Contribution Among Tort-Feasors Law, 10 *Del. C.* §§ 6301-6308 ("UCATL"). Further, it asserts that contribution is not a proper remedy in this case because it applies only to parties who have been found jointly and severally liable for a tort, which the State cannot be. Finally, the State contends that the Lease does not explicitly provide for contribution from the State. The County responds that by entering into the Lease, the State "effected a complete waiver of sovereign immunity with respect to all liability claims arising from and around the Lease."[39]

As previously discussed, the Third-Party Complaint involves different issues from the earlier opinions in this case. In addition, I have already held that the Third-Party Complaint states a claim for breach of contract. Consequently, requiring contribution from the State as a result of their contractual obligations would not hold them liable indirectly for something for which the State could not be held directly liable.

For purposes of the UCATL, joint tortfeasors means "2 or more persons jointly or severally liable in tort for the same injury to person or property, whether or not judgment has been recovered against all or some of them."[40] In terms of the applicability of

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[39] County's Ans. Br. at 7.

[40] 10 *Del. C.* § 6301.

UCATL and generally, the case of *Di Ossi v. Edison*[41] presents facts strikingly similar to this case.

In *Di Ossi v. Edison*, a family contractually agreed that defendant, a food and beverage service company, would provide bartenders and waitresses for a party.[42] As part of the contract defendant agreed it would not serve alcoholic drinks to minors. Nevertheless, a 19 year old guest at the party lost control of his car that night, ran off the driveway, struck a tree and hit the plaintiff. The plaintiff then brought a tort suit against the family who threw the party, and they, in turn, sought to hold the food and beverage service company liable under the UCATL for either indemnification or contribution.

The defendant argued that the family had no right to contribution because the UCATL only applies to tort actions. The court agreed, but held that, under principles of contract law, the family still could pursue a right of contribution or indemnity based on the alleged breach of contract.[43] The court reasoned that although the family could not recover from defendant under the UCATL, which by its express terms does not apply to contractual claims:

> [I]t would be an anomaly under the law if a party could contract to perform duties, breach its performance of those duties causing the other contracting party to be liable, and then as a shield to liability claim that there is no remedy by its breach because the party proceeds under a contract theory rather than tort. Additionally, preclusion of the claim for

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41 1989 WL 135755 (Del. Super. Oct. 25, 1989).

42 *Id.* at *1.

43 *Id.* at *5.

> indemnification or contribution under contract would be inconsistent with § 6305 which provides that the chapter does not impair any right of indemnity under existing law. Delaware law has recognized that where there is no cause of action available for contribution under 10 *Del. C.* § 6301-08, there may be an action available in contract.[44]

Similarly, in this case the County cannot claim contribution or indemnity under UCATL. Yet, it can seek indemnification or contribution from the State as a result of its alleged breach of the Lease for any damages suffered by the County caused in whole or in part by the State's breach of the Lease. Consistent with the holding in *DiOssi*, I conclude that the UCATL does not bar the County from recovering from the State for indemnification or contribution.

Next, I address whether the Lease bars the County from seeking contribution or indemnification from the State. Paragraph 20 of the Lease states that:

> Except as provided in paragraphs 15 and 33 thereof, no mention in this Lease of any specific right or remedy shall preclude either party from exercising any other right or from having any other remedy or from maintaining any action to which it may be otherwise entitled either at law or in equity . . . .[45]

This demonstrates that although the parties did not expressly provide for indemnification or contribution, the absence of express terms providing for such relief does not mean the parties intended to exclude that possibility.

The State suggests, however, that paragraph 22 limits the County's remedies for a breach of the Lease. That paragraph states:

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[44] *Id.* at *2 (citations omitted).

[45] Lease ¶ 20.

> Upon breach the Lessee may, at its option elect to exercise any or all of the following remedies:
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> a.) The Lessee shall terminate this Agreement immediately.
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> b.) The Lessee may withhold any payments due to the Lessor.[46]

Reading this language in conjunction with paragraph 20, I do not believe that the parties intended paragraph 22 to limit the County's relief for breach of contract. Paragraph 22 merely lists two remedies that the County could elect if it so desired. Neither the UCATL or the Lease, in my opinion, prohibits the County from asserting a right of contribution or indemnity against the State.[47]

F. Does the Delaware Constitution Bar the State from Indemnifying the County?

The State argues that the County is not entitled to indemnification because Article VIII, § 3 of the Delaware Constitution prohibits the creation of a debt for the State without passage by three-fourths of all members elected to the General Assembly and approval by the Governor. It also argues that Article VIII, § 6(a) prohibits indemnification because it prohibits payment of public monies without prior appropriation approval of the General Assembly.

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[46] Lease ¶ 22.

[47] At this preliminary stage on a motion to dismiss, the Court simply recognizes the possibility that the County might prevail on a contribution or indemnity claim against the State. Whether the County actually enjoys such rights, the parameters of them and their applicability on these facts must await further development of the record.

Article VIII, § 3 provides:

> No money shall be borrowed or debt created by or on behalf of the State but pursuant to an Act of the General Assembly, passed with the concurrence of three-fourths of all members elected to each house, except to supply casual deficiencies of revenue, repel invasion, suppress insurrection, defend the State in war, or pay existing debts; and any law authorizing the borrowing of money by or on behalf of the State shall specify the purpose for which the money is to be borrowed, and the money so borrowed shall be used exclusively for such purpose . . . .

This section makes the borrowing of monies upon the credit of the State and expenditure of the proceeds invalid unless it is done for a public purpose.[48] Neither party cited any case addressing the specific issue presented in this action and the Court found no Delaware case on point. A reasonable argument exists, however, that the General Assembly intended not to extend Article VIII, § 3 to indemnity claims, but rather to limit its application to loans.[49] Thus, I do not find Article VIII, § 3 applicable to the facts of this case.

Article VIII, § 6 provides in relevant part:

> Section 6. (a) No money shall be drawn from the treasury but pursuant to an appropriation made by Act of the General Assembly; provided, however, that the compensation of the members of the General Assembly and all expenses connected with the session thereof may be paid out of the

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48 *Opinion of the Justices*, 358 A.2d 705, 708-09 (Del. 1976).

49 *Cf. Opinion of the Justices*, 177 A.2d 205, 209-10 (Del. 1962) (statute authorizing Industrial Commission to pledge full faith and credit of State to guaranty of bonds issued by development corporation certified by Commission, dependent upon certain statutory findings, was not objectionable on ground that it amounted to delegation to Industrial Commission of legislative powers of creating debt or pledging credit of state).

> treasury pursuant to resolution in that behalf; a regular account of the receipts and expenditures of all public money shall be published annually.

Although Article VIII, § 6 places restrictions on the State's ability to allocate debt, here the General Assembly has authorized such an allocation by authorizing the State to enter into the Lease. Thus, even if the Lease implicates Article VIII, § 6 the General Assembly has approved the allocation of money for obligations under the Lease through 29 *Del. C.* § 8803. Consequently, Article VIII, §§ 3 and 6 do not bar the County from obtaining indemnification from the State.

III. CONCLUSION

For the reasons stated I deny both the State's motion to dismiss the Third-Party Complaint Against Third-Party Defendant State of Delaware and the County's related motion for summary judgment.

IT IS SO ORDERED.